



[4910-13]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Passenger Facility Charge (PFC) Program: Eligibility of Ground Access Projects Meeting Certain Criteria

AGENCY: Federal Aviation Administration (FAA); DOT

ACTION: Notice of Proposed Policy Amendment and Request for Comments

SUMMARY: The FAA proposes to amend its “Notice of Policy Regarding the Eligibility of Airport Ground Access Transportation Projects for Funding Under the Passenger Facility Charge (PFC) Program,”¹ regarding the requirements for PFC funding of on-airport, rail access projects.

DATES: Comments must be received on or before [insert date 30 days after publication in Federal Register]. Comments that are received after that date will be considered only to the extent practical.

ADDRESSES: You may send written comments by any of the following methods. Identify all transmissions with “Docket Number FAA 2016-XXXX” at the beginning of the document.

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery: Deliver comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

¹ 69 Fed. Reg. 6366 (Feb. 10, 2004).

- Fax: (202) 493-2251.

To read background documents or comments received, go to <http://www.regulations.gov> at any time or to Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, telephone (202) 267-3831; facsimile (202) 267-5302.

SUPPLEMENTARY INFORMATION:

Section 123(e) of Public Law 108-176, Vision 100-Century of Aviation Reauthorization Act (December 12, 2003) directed the FAA to publish a policy on the eligibility of ground access projects for PFC funding. The FAA's Notice of Policy Regarding Eligibility of Ground Access Transportation Projects for Funding Under the Passenger Facility Charge Program (2004 Notice), 69 Fed. Reg. 6366, was published on February 10, 2004. The 2004 Notice presented the relevant statutory requirements as well as FAA's regulations and guidance on PFC-funded ground access transportation projects in a consolidated form.² As stated in the 2004 Notice, the statutory requirements include the significant contribution test for PFC contributions higher than \$3 per passenger (49 U.S.C. 40117(d)(3)); the Airport Improvement Program (AIP) funding test (49 U.S.C. 40117(b)(4)(B); 14 CFR 158.17(a)(2)) and the airside needs test (49 U.S.C. 40117(d)(4); 14 CFR 158.17(a)(3)).³ Other requirements can be found in 14 CFR Part 158; FAA Order 5500.1, "Passenger Facility Charge" (August 9, 2001); "The AIP Handbook," FAA Order

² 69 Fed. Reg. 6367.

³ *Id.*

5100.38D (September 30, 2014); and FAA PFC records of decision and final agency decisions on about the use of PFC revenue to finance airport ground access transportation projects.⁴

For purposes of the policy, airport ground access includes all potential surface transportation modes (*i.e.*, road, light and heavy rail, and water).

The 2004 Notice restated the agency’s longstanding policy requirement from the AIP Handbook, FAA Order 5100.38, that to be AIP and/or PFC eligible, an airport ground access transportation project must meet the following conditions:

- (1) The road or facility may only extend to the nearest public highway or facility of sufficient capacity to accommodate airport traffic;
- (2) the access road or facility must be located on the airport or within a right-of-way acquired by the public agency; and
- (3) the access road or facility must exclusively serve airport traffic.⁵

The first and second of these requirements are relatively straightforward to apply and evaluate.

The third requirement (exclusive use) requires more explanation. The 2004 Notice stated that “exclusive use of airport patrons and employees means that the facility can experience no more than incidental use by non-airport users.”⁶ By incidental use, the 2004 Notice explains, routine use of the rail ground access transportation facility by non-airport users must “be unattractive and non-airport users in fact constitute only a minor percentage of total system ridership.”

However, the 2004 Notice also stated that “Exclusive airport use does not mean that any non-airport use must be prevented at all costs.”⁷

⁴ *Id.*

⁵ *Id.* at 6367.

⁶ *Id.* at 6368.

⁷ *Id.*

The 2004 Notice also stated that related facilities, such as acceleration and deceleration lanes, exit and entrance ramps, lighting, equipment to provide operational control of a rail system or people mover, and rail system or people mover stops at intermediate points on the airport are eligible when they are a necessary part of an eligible access road or facility. In addition, the public agency must retain ownership of the completed ground access transportation project. The public agency may choose to operate the facility on its own or may choose to lease the facility to a local or regional transit agency for operation within a larger local or regional transit system. During the 12 years that have ensued since publication of the 2004 Notice, the FAA has consistently applied these criteria. However, as FAA's experience in administering the program has developed, it has become clear that strictly applying criteria originally designed to judge eligibility for on-airport road access projects, to on-airport rail projects, can produce financially and practically inefficient outcomes. The concept of "exclusive use" has been the subject of particular interest because of the underlying principle that the stakeholders who pay excise taxes on airline passenger tickets or passenger facility charges should not have to pay the costs of facilities, except to the extent necessary to meet the needs of airport patrons and employees. Over the years, the FAA has had to decide whether all or portions of proposed on-airport ground access projects utilizing rail, or portions thereof, met the policy requirement that the rail right-of-way exclusively served airport traffic. In the past, both before and after the publication of the 2004 Notice, the FAA has found that almost all otherwise eligible *rail stations* located on-airport are eligible for PFC funding under agency guidelines, because they are exclusively used by airport patrons and employees.⁸ However, whether the right of way or guideway itself met the historical interpretation of

⁸ 64 Fed. Reg. 53763 (Oct. 4, 1999); PFC Record of Decision, Application No. 01-08-C-00-PDX (July 20, 2001) at 8.

exclusive use depended upon the configuration of the rail line (e.g., whether a spur line terminating at the airport, or a through-line where the airport station is not the terminus).

Historically, the FAA has approved funding only for tracks or guideways that clearly meet the requirement of exclusive use, by virtue of the physical configuration of the rail line.⁹

As discussed below, the FAA recently received a request for the use of PFC revenue to fund an on-airport ground access rail station and related trackage, where the trackage would not exclusively serve airport traffic because the rail line would not terminate at the airport station but continue beyond the airport property. Our review and evaluation of the application has caused the agency to consider whether the exclusive use policy is unduly limiting, thereby preventing the approval of PFC funds for some airport ground access projects that might be consistent with the agency's mission to "encourage the development of intermodal connections on airport property between aeronautical and other transportation modes and systems to serve air transportation passengers and cargo efficiently and effectively and promote economic development." 49 U.S.C. 47101(a)(5).¹⁰

Specifically, the agency notes that by extending the rail line beyond the airport, thereby providing more transit options for more travelers and increasing the utility of the system consistent with the agency's mission, the financing options for that system become conversely limited. There are fundamental differences between fixed-guideway systems like rail and public roads. With road access, all that is needed to facilitate efficient access to the air transportation system is a direct connection from the airport to a main thoroughfare or population center, as individual drivers can then choose their own path to their destination. The roads used by airport visitors are typically part of a broader system that may be funded, constructed, and maintained

⁹ *Id.*

¹⁰ This policy, when completed, will also apply to AIP eligibility. However, due to AIP rules that limit funding for airport terminal development, rail access projects would not likely be funded with AIP funding.

by multiple levels of government or private entities for multiple purposes and journeys. Given the open and variable nature of road systems, it is critical for the FAA to apply strict eligibility criteria that tie the funding of the on-airport project to the exclusive use of the airport. Without such criteria, users of the infrastructure could benefit from federally-approved funds designed to improve access to the national air transportation system without ever intending to visit, or actually visiting, the airport. Airport rail access projects, however, are planned, funded, constructed, operated, and used differently from on-airport road projects. By their nature, passenger rail and rail transit aggregate passenger traffic along fixed routes with a limited number of stops, each with their own justification and purpose. Users of road infrastructure have more flexibility and control in determining their route than users of rail, who are more limited in their options. Without a very strict exclusive use requirement, users of access roads could take advantage of that infrastructure, and make a choice to never pass through the airport itself. Users of rail, however, have little choice of route and their degree of control over that route. Non-airport users are not taking advantage of the airport portions of track by choice, but are more likely to be passing through the airport because they cannot use rail travel to their destination without doing so. The FAA is seeing an increasing number of circumstances and physical configurations in which strict adherence to the historical interpretation of 'exclusive use' may not be in the balance of the public interest.. Indeed, rigid application of the historical policy, designed primarily for road access projects, potentially frustrates the FAA's own objectives as set forth in 49 U.S.C. 47101(b)(5) and (6).

Additionally, population and demographic trends have changed since the ground access policy was developed. Many airports that were originally constructed on the periphery of population centers, now find themselves ensconced as suburban growth has extended to and beyond the

airport. As such, it may no longer make sense for a “downtown” rail or transit line to terminate at the airport, as there now exists a pool of potential users beyond the airport. However, under current policy, which equates on-airport rail projects with “access roads,” extending rail/transit access beyond the airport so that these populations can also access the airport precludes the use of federally-approved funds, such as PFCs, for significant portions of the project since the line would go beyond the airport and no longer serves airport traffic exclusively.

Accordingly, the FAA is considering amending the 2004 Policy so that on-airport rail access projects are no longer treated identically to access roads.

The FAA is evaluating whether, consistent with intermodal policy under 49 U.S.C. 47101(b)(5) and (6), it should reconsider its policy to only permit ground access projects where the airport terminal is the terminus of the rail line, or whether PFCs should also be available for other types of rail projects. The FAA is soliciting comment on whether it should amend its policy to consider rail projects that are located on airport, but that may not exclusively serve air traffic, where the creation of a separate spur into the airport (in order to ensure exclusive use of the right-of-way) would be materially more expensive than having the rail line transit the airport property and continue beyond and/or would be contrary to the agency’s mission to “encourage the development of intermodal connections at airports.” 49 U.S.C. 47101(a)(5). The FAA requests comments on several policy alternatives for determining when rail projects on airport are eligible for PFC funding. After reviewing comments, the FAA may permit some of the alternatives to establish PFC eligibility or may permit other alternatives raised by commenters. One recent PFC application received by the FAA highlights the agency’s experience with intermodal objectives, and a need for flexibility in using PFCs to fund on-airport rail access. In March 2014, the FAA received a PFC application from the Metropolitan Washington Airports

Authority (MWAA) that included a request to use PFCs to help fund both an on-airport station and a portion of the on-airport tracks that would be located immediately adjacent to the station. Although both segments of the track would be located on airport property and connect to the nearest public transportation facility, the tracks would not be exclusively used by airport patrons and employees, as has been historically required based on the FAA's policy, per the 2004 Notice, to analyze rail projects under the same framework as access roads.¹¹ The tracks would not be for the exclusive use of airport patrons and employees because the rail line in question would not terminate at the airport station, but continue to other destinations beyond the airport.

In a July 11, 2014, final agency decision, the FAA approved portions of the application and the Dulles Airport Metrorail Station project in particular, but deferred consideration of "the track portions of this project (beyond the Airport station footprint)."¹²

The FAA's final agency decision stated that "The FAA is generally reviewing the historical interpretation of exclusive use, and considering possible refinements in the general eligibility criteria relating to track and guideway elements, on airport, in certain circumstances."¹³

In its consideration of this potential policy change, the FAA must be mindful of how such a change could affect future airport ground access project approvals. The agency will have to balance the benefit to the airport (e.g., increasing ease of access for airport patrons, and employees; decreased ground congestion; preserving or enhancing capacity, etc.) against the use of PFCs to pay for the trackage or guideway where use of that right-of-way would not exclusively serve airport traffic as historically interpreted.

DISCUSSION ON PROPOSED POLICY: As a result of its review and evaluation of the MWAA application, and past PFC decisions relating to airport ground access, the FAA has

¹¹ *Id.*

¹² FAA Final Agency Decision dated July 11, 2014, page 22.

¹³ *Id.*

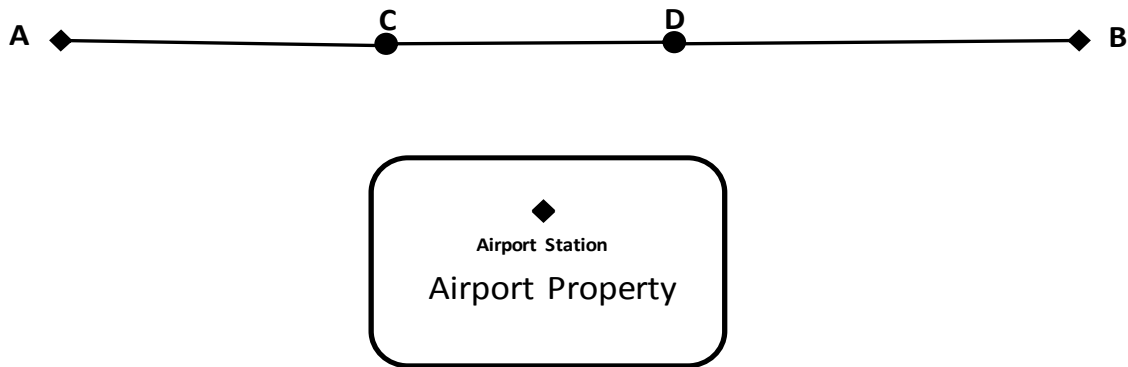
identified three proposed means by which an airport could demonstrate eligible costs of on-airport rail trackage to be funded through PFC revenues. These proposals are based on the underlying principle that the stakeholders who pay PFCs should not have to pay the costs of facilities, except to the extent necessary to meet the needs of airport patrons and employees, and also promote the agency's statutory mission to expand intermodal links at the nation's airports. The three proposals are:

1. Incremental Cost Comparison: The increased cost of a through-track solution (compared to a track that bypasses the airport) benefits no one but the airport passengers and employees.

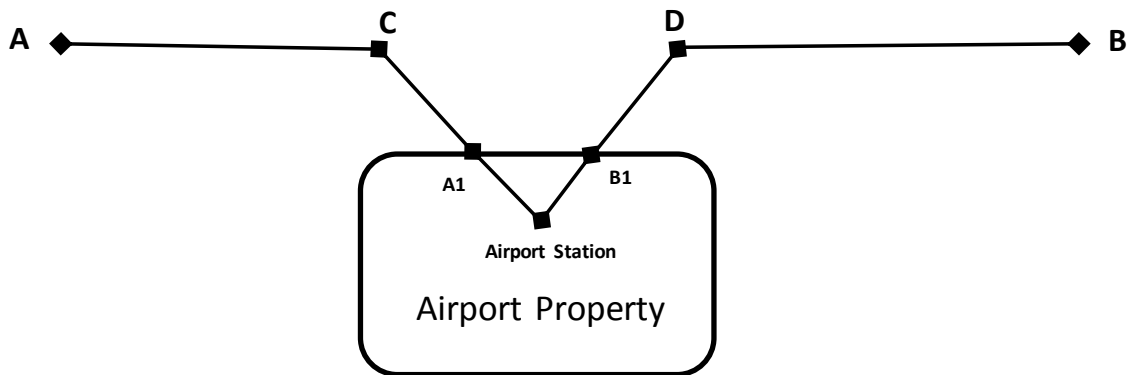
Detailed Discussion of Alternative:

- For this alternative, the public agency could demonstrate that the rail line would be built from Point A to Point B regardless of whether the airport station is added.
- This approach would compare the actual cost needed to serve airport passengers and employees against the cost of the PFC project (airport station).
- If not for the service to the airport, the track alignment in this section (Section C-D) would typically be shorter, straighter, and less expensive than that of a design that includes the Airport Station (C-A1-Airport Station-B1-D).

Track that Bypasses the Airport



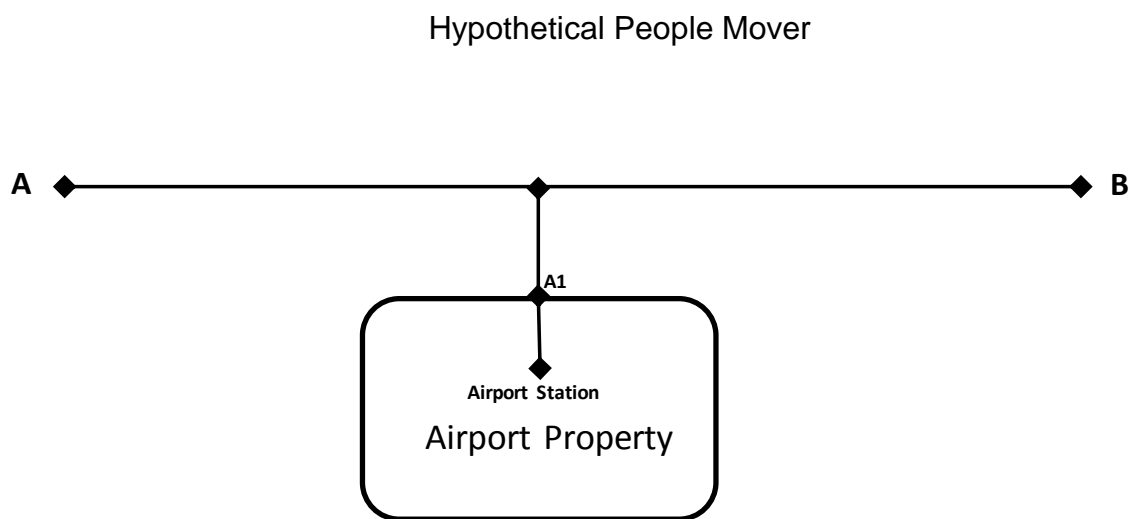
Track that Includes the Airport Station



- The approximate incremental cost to serve the airport is the difference between the track cost to serve the airport (C-A1-Station-B1-D) and the cost if the track did not deviate to serve the airport (C-D). This incremental cost represents the costs needed to directly benefit airport passengers and employees. This incremental cost forms the basis of PFC eligibility. However, only that trackage on airport property (A1-Airport Station-B1) is eligible for PFC funding.
2. Separate System Comparison: The project costs of a through-track solution is less expensive than a stand-alone people-mover bringing passengers in from an off-airport station.

Detailed Discussion of Alternative:

- The full costs of a hypothetical people mover system including the costs of the Airport Station, the transport vehicles, and the full costs of the rail line between the Airport Station and A1 (theoretical airport property line) would typically be eligible for PFC funding.



- This alternative would compare the cost of developing a hypothetical people mover system (on airport) against the cost of bringing the transit line to and through an on-airport station.

If the airport can demonstrate that the costs to be funded through PFC revenues would be less than the cost of building a separate system, then the costs to be funded through PFC revenues would be eligible.

3. Prorate the costs of the trackage on airport property based on ridership forecast. If the airport can demonstrate that the costs to be funded through PFC revenues would be no

more than the prorated costs of the trackage on airport property, based on ridership forecasts and the percentage representing passengers and employees utilizing the airport, then those costs could be considered eligible.

COMMENTS INVITED:

The FAA invites interested persons to submit written comments, data, or views concerning this proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments only one time.

The FAA will file in the docket all comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposal. Before acting on this proposal, the FAA will consider all comments received on or before the closing date for comments and any late-filed comments if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of comments received.

Issued in Washington D.C. on April 27, 2016.

Elliott Black
Director, Office of Airport Planning and Programming
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